increases of pollutants, see 42 U.S.C. 7473 – through permitting of "major" sources of pollution. 42 U.S.C. 7475, 7479(1), 7602(j). If permitted, major sources constructed or modified in a PSD area must install the "best available pollution control technology" ("BACT"), *id.* 7475(a), identified on a "case-by-case" basis based on environmental, economic, and other factors. See *id.* 7479(3). Facilities subject to PSD must also comply with the NSPS and other CAA requirements. *Id.* 7475(a)(3). See generally *ADEC*, 540 U.S. at 472-75. (Together with corresponding site-specific permitting requirements for nonattainment areas, 42 U.S.C. 7501-7515, PSD review of new and modified sources is called "New Source Review" or "NSR." See *New York*, 413 F.3d at 12-13.).

Whereas the 1970 NSPS program establishes categorical requirements that apply "[w]ithout regard to the effect of the emissions from [an NSPS] facility will have on overall air quality," *Potomac Electric Power Co. v. Environmental Protection Agency*, 650 F.2d 509, 518 (4th Cir. 1981), PSD "focuses on where the plant will be located and its potential effect on its environs," *Citizens for Clean Air v. EPA*, 959 F.2d 839, 849 (9th Cir. 1992), and demands a site-specific review of whether a proposed major source will contribute to a significant degradation of local air quality despite compliance with the NSPS. See 42 U.S.C. 7470(1); *Alabama Power v. Costle*, 636 F.2d 323, 346-51 (D.C. Cir. 1979); 44 Fed. Reg. 51,924, 51,931 (Sept. 5, 1979).

The 1977 amendments granted existing sources a qualified exemption from the PSD requirements based in part on a concern that "[f]or some of the older and smaller sources, it is not physically or economically feasible to retrofit * * * control technology." H.R. Rep. No. 94-1175 at 159 (1976). The resulting environmental harms were understood to be limited, however, because existing plants had limited useful lives and would be retired within a relatively short time. See, *e.g.*, H.R. Rep. No. 94-1175 at 159 ("[I]t is imprudent to backfit FGD [a control technology] into existing plants,

especially older units facing retirement within 10-15 years."); S. Rep. No. 95-127 at 128 (1977) ("There are in the United States approximately 200 old coal-fired power plants over 20 years of age. * * * Most will be totally phased out of operation in the next 5 to 20 years.") (additional views of Sen. Baker).

But consistent with its emphasis on "'a proper balance between environmental and economic goals,'" *New York*, 413 F.3d at 13 (citations omitted), Congress subjected existing major sources that undertake "modifications" to PSD. The PSD provisions define "construction" of a source to include "modification," which, in turn, is defined by cross-reference to the 1970 Act's definition of "modification" for the NSPS program, which embraces physical or operational "changes" to a source that "increase the amount" of any air pollutant emitted. See 42 U.S.C. 7479(2)(C) (PSD "construction" "includes the modification (as defined in section 7411(a) of this title) of any source or facility").

In 1980, EPA promulgated comprehensive PSD regulations specifying what activities satisfy the two statutory requirements for a "modification": (1) a physical or operational "change," and (2) an "increase" in the amount of any air pollutant emitted by the source. 45 Fed. Reg. 52676 (Aug. 7, 1980); see 40 C.F.R. 51.166 (1987).[1] The PSD regulations define an emissions "increase" in terms of "actual emissions," measured in "tons per year." 40 C.F.R. 51.166(b)(2), (3), (21) (1987). EPA emphasized that it had drafted the regulations to comport with the *Alabama Power* court's reading of the PSD statute to emphasize actual

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[1] EPA initially promulgated PSD regulations in 1978, 43 Fed. Reg. 26,380 (June 19, 1978), but it replaced them with new regulations following the D.C. Circuit's decision in *Alabama Power Co. v. Costle*, 636 F.2d 323 (D.C. Cir. 1979). The PSD regulations applicable to the activities at issue in this case, which occurred between 1988 and 2000, were promulgated in 1980 and recodified in 1987. See App. 5a n.1. Certain of the activities are governed by a subsequent set of PSD regulations promulgated in 1992, 57 Fed. Reg. 32,314 (July 21, 1992), but the differences are not material here.

impacts of source activity on ambient air. 45 Fed. Reg. at 52699-52700. Thus, EPA's 1980 rules sought "as close a correspondence as possible" between the regulatory coverage of new and modified sources and their actual impacts on air quality and available PSD increment. 45 Fed. Reg. at 52,701. EPA specifically refused to exempt from the emissions-increase calculation additional emissions that occur when physical improvements at an existing facility enable "increased hours of operation or capacity utilization." *Id.* at 52,714. See also *id.* at 52,718.[2] Petitions for review challenging the EPA's 1980 regulations were filed in the D.C. Circuit, and then stayed.[3]

EPA issued a formal interpretation of the 1980 regulations in a 1989 applicability determination concerning the refurbishment of old power generation facilities by the Wisconsin Electric Power Company ("WEPCo"). The agency rejected a utility's contention that *only* increases in the source's maximum emissions "rate" triggered PSD review, explaining that actual emissions are the product of "three factors": (1) the "emissions rate" ("e.g., pounds of sulfur dioxide per ton of coal combusted" emissions per unit of

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[2] The regulations specify, however, that an "an increase in the hours of operation or in the production rate," does not by itself constitute a "physical change or change in the method of operation." 40 C.F.R. 51.166(b)(2)(iii). Regarding its decision to treat increased hours of operation as a PSD trigger only when accompanied by accompanied a physical or operational "change," EPA explained that while "as a general rule Congress intended any significant net increase in such emissions to undergo PSD" review, the statute's "emphasis * * * on 'construction'" indicated an intent not to find a "modification" requiring PSD review when a company merely increases its hours of operation "to take advantage of favorable market conditions." 45 Fed. Reg. at 52704.

[3] Challenges to the 1980 regulations were consolidated in *Chemical Manufacturers Assoc. v. EPA*, No. 79-1112 (D.C. Cir.), then stayed pursuant to a settlement agreement that obligated EPA to consider amendments to its PSD regulations. EPA ultimately decided not to adopt the proposed regulations, see 67 Fed. Reg. at 80204-06, and the revived challenges were addressed in *New York*. See 413 F.3d at 14-15.

production); (2) the "production rate" ("e.g., tons of coal combusted per hour"), and (3) "hours of operation (e.g., hours per year)." *Letter from Don R. Clay, Acting Assistant Administrator for Air and Radiation, to John H. Boston, Vice President, WEPCo.* (Feb. 15, 1989) (CA App. 838). EPA explained that "an increase in any one of these three specified factors, if attributable to a physical or operational change, can trigger an emissions increase for PSD purposes[.]" *Id.*

Reviewing that determination under Section 307(b), the Seventh Circuit upheld EPA's reliance on actual emissions (including those reflecting increased hours of operation). *Wisconsin Electric Power Co. v. Reilly*, 893 F.2d 901 (7th Cir. 1990). The court observed that EPA's PSD and NSPS regulations measured emissions increases in "a fundamentally distinct manner," explaining that NSPS "is concerned primarily with increases in emissions rates, expressed in kilograms per hour," whereas "[u]nlike NSPS, PSD is concerned with changes in *total annual emissions*, expressed in tons per year," 893 F.2d at 913, 915 (emphasis original). The court also agreed with EPA that the increased hours of operation made possible by WEPCo.'s extensive upgrading of its facilities did not qualify for the "increased hours of operation" exemption, which "was provided to allow facilities to take advantage of fluctuating market conditions, not construction or modification activity." 893 F.2d at 916 n.11. See also *Puerto Rican Cement Co. v. EPA*, 889 F.2d 292, 297 (1st Cir.1989) (Breyer, J.) (upholding EPA's application of 1980 regulation measuring PSD emissions "increases" to include emissions from increased utilization enabled by physical upgrade and observing that EPA's regulation took account of "the fact that a firm's decision to introduce new, more efficient machinery may lead the firm to decide to increase the level of production, with the result that, despite the new machinery, overall emissions will increase").

Factual and Procedural Background. Respondent Duke operates thirty coal-fired generating units at eight plants in the Carolinas that began service between 1940 and 1975. In the

1980s and 1990s, Duke undertook a "Plant Modernization Program" intended to refurbish these facilities to allow the plants – many of them so worn as to be often or always out of service – to operate more of the time, and to enjoy longer lives. Duke stated that the subject facilities were "no longer reliable because of their age" (CA App. 744), and would that some require a "total rehabilitation" that would extend the facility's useful life an "additional 20 years," "well beyond" its "expected retirement." CA App. 770-72, 776.[4] The costs of rehabilitation were often many times the original cost of the unit. See CA App 730, 785-86. To accomplish the renovations, Duke shut down the units for lengthy periods, in some instances more than a decade. CA App. 756-61.

Unlike the regulated entities in cases like *WEPCo.* and *Puerto Rican Cement*, Duke never sought an applicability determination on whether its modernization undertaking was subject to PSD review; rather it simply proceeded with the project upgrades at the various plants. In December 2000, the United States filed an action against Duke in the United States District Court for the Middle District of North Carolina pursuant to Sections 113(b) and 167 of the CAA, charging that Duke had violated the Act by engaging in 29 "modifications" without obtaining PSD permits required under the Act and the applicable state implementation plans. Petitioners intervened as plaintiffs.

The parties disputed how to measure whether Duke's Modernization Program caused a "significant net emissions increase" under the governing 1980 PSD regulation. 40 C.F.R. 51.166(b) (1987). The United States submitted that those extensive refurbishments would increase emissions by allowing aging facilities that had fallen into sporadic use or total disuse to operate more of the time, resulting in large increases in the actual, annual emissions targeted under the

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[4] A Duke representative told state regulators in 1985 that "[h]istorically, units of this age and condition would be retired and scrapped." CA App. 744.

1980 PSD regulations. However, the district court agreed with Duke's argument that, in employing for the PSD program the same statutory definition of "modification" already in place for the NSPS, Congress intended to adopt an NSPS regulation that (according to the court) employed a "maximum hourly emissions rate" test under which a project refurbishment enabling a plant to operate for more hours, but without changing the maximum emissions rate, would not count as having "increased" emissions. App. 58a-61a. To frame the issue for appeal, plaintiffs stipulated that Duke's activities would not cause a PSD-triggering "net emissions increase" under such a test and, based on that stipulation, the court entered final judgment for Duke. App. 87a.

After initial briefing and oral argument, the Fourth Circuit panel directed the parties (App. 21a) to address the relevance of a case none had cited, *Rowan Companies, Inc. v. United States*, 452 U.S. 247 (1981), in which this Court invalidated certain Treasury regulations that construed identical definitions of "wages" in two sections of the Internal Revenue Code differently. The United States and petitioners argued that the *Rowan* did not call into question EPA's PSD regulations, and that Section 307(b) barred review of the consistency of the regulations with the CAA in this enforcement action.

The Fourth Circuit affirmed the judgment for Duke. It did not adopt the district court's theory that Congress had adopted a specific NSPS regulatory test. Instead it reasoned that "because Congress mandated that the PSD definition of 'modification' be identical to the NSPS definition of 'modification,' the EPA cannot interpret 'modification' under the PSD inconsistently with the way it interprets the term under the NSPS." App. 11a (footnote omitted). The court relied both on "[c]ommon sense," and on *Rowan*, which it read to require that "when Congress itself provided 'substantially identical' statutory definitions of a term in different statutes, the agency charged with enforcing the statutes could not interpret the statutory definitions

'differently.'" *Id.* at 547 (quoting *Rowan*, 452 U.S. at 257).

In a footnote, the Fourth Circuit addressed the appellants' argument that CAA Section 307(b) precluded it from reviewing consistency of the PSD regulations with the statute. The panel stated that "no question as to the validity of the PSD regulations is (or could be, see 42 U.S.C. § 7607(b)) [Section 307(b)], presented here," explaining that "the PSD regulations can be interpreted consistently with pre-existing principles – the NSPS regulations * * *" App. 15a n.7. The Court further stated that its decision did not reflect an "invalidation" of the regulations, but merely a requirement that the PSD regulations and the NSPS regulations be "similarly interpreted and enforced." *Id.*

Nine days later, the D.C. Circuit, exercising jurisdiction under Section 307(b), issued its decision on the consolidated challenges to EPA's 1980, 1992, and 2002 PSD regulations. *New York*, 413 F.3d 3. The court upheld the 1980 PSD regulations at issue here against challenges by an industry coalition including respondent Duke, specifically rejecting industry's argument that Congress, by incorporating for PSD purposes the statutory definition of "modification" initially enacted for the NSPS program, had adopted specific NSPS regulations in place at that time. 413 F. 3d at 19-20. The court ruled that the Act's use of the cross-referencing definition created no such inference about legislative intent, noting among other things that when the PSD definition was added in 1977, two *different* regulatory definitions for NSPS emissions "increases" (one of which industry had not cited) were in place. *Id.*

The D.C. Circuit acknowledged the decision in this case, but found that industry petitioners there had waived the argument that "Congress must use identical regulatory definitions of modification across the NSPS and NSR programs." 413 F.3d at 20. Noting that industry had made "no attack at all on the reasonableness of EPA's definition of modification for NSR (apart from its divergence from one of the 1975 NSPS definitions)" the court "reject[ed] this portion

of industry's challenge to the 1980 and the 2002 rules." *Id.*

In *New York*, the D.C. Circuit set aside a portion of the 2002 regulations, called the "Clean Units" provision, which exempted from PSD review certain changes that increased actual emissions. 413 F.3d at 39-40. The D.C. Circuit ruled that "the plain language of the CAA indicates that Congress intended to apply NSR [which includes PSD] to changes that increase actual emissions instead of potential or allowable emissions[.]" *Id.* at 40.

Petitioners and the United States sought rehearing in the Fourth Circuit. The United States referenced the Fourth Circuit's explanation that Section 307(b) was no bar because the court was "merely mandating one possible interpretation," of the PSD emissions "increase" regulation, and then observed that D.C. Circuit in *New York* had just "held that the statutory language mandates a contrary interpretation," a situation the United States termed as "precisely the type of outcome that [Section 307(b)] was enacted to prevent." U.S. Pet. for Reh. in 04-1763 at 10 (filed Aug. 10, 2005) (2005 WL 1978694). Both petitions were denied.[5]

Shortly thereafter, EPA issued a notice of proposed rulemaking proposing to amend its regulations to establish a "uniform emissions test nationally under the NSPS and NSR programs[.]" 70 Fed. Reg. 61081, 61083 (Oct. 20, 2005). While stating that EPA "respectfully disagreed" with the decision in this case, the notice stated that the need for amendments was "apparent" in light of the panel's ruling. *Id.* at 61083 & n.3.

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[5] Petitions for panel rehearing and rehearing en banc filed by EPA and industry in the *New York* case were denied on December 9, 2005, 2005 WL 3334349 (D.C. Cir.).

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS INVALIDATED NATIONAL CAA REGULATIONS IN VIOLATION OF SECTION 307(b), IN VIOLATION OF THIS COURT'S PRECEDENT AND DECISIONS OF OTHER COURTS OF APPEALS

The court of appeals held that EPA "cannot interpret 'modification' under the PSD inconsistently with the way it interprets that term under the NSPS," because Congress "intended the statutory definitions of 'modification' in the PSD and NSPS provisions to be interpreted identically." App. 14a. This ruling cannot be fairly read as anything short of an invalidation of the test for "emissions increases" set forth in EPA's 1980 regulations – turning on changes in actual, annual emissions, measured in "tons per year," 40 C.F.R. 51.166(b)(3), (21) (1987) – as contrary to the statute.[6]

In reaching that holding, the Fourth Circuit disregarded all three of the distinct limitations on the timing, forum, and type of judicial review proceedings that Section 307(b) imposes: exclusive D.C. Circuit review of national CAA regulations; filing of challenges within 60 days; and the command that EPA actions reviewable by petition for review "shall not be subject to judicial review" in enforcement proceedings. See also 42 U.S.C. 7607(e).

The basis of the Fourth Circuit's ruling was *not* the application of EPA's regulations to particular facts; rather the court announced a categorical rule, based on assertedly "plain" statutory language, that EPA lacks the authority to adopt PSD modification regulations that interpret emissions "increase" – a component term of the modification definition – differently from how EPA's NSPS regulations interpret that

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[6] As we explain below, the Fourth's explanation that Section 307(b) was no bar because the court was merely "interpreting" the 1980 regulations, App. 11a n.7, was demonstrably wrong (and if correct would still not have justified the court's action).

term. See App. 14a-18a. Indeed, the court candidly acknowledged that because (in its view) Congress had "directly spoken to the precise question at issue * * * the language and various interpretations of the PSD regulations" were "largely irrelevant to the proper resolution of this case." App. 11a n.3. But Section 307(b) expressly forbids courts from engaging in such statutory-consistency review of national EPA regulations in an enforcement proceeding.

The Fourth Circuit's decision here represents an abrupt departure from the decisions of other courts of appeals, which have held that contentions that CAA regulations are contrary to statute are cognizable only in the D.C. Circuit, and are barred from enforcement proceedings.[7] These courts have correctly regarded the limitations in Section 307(b) (and the similar or identical limitations on judicial review provided in many other major regulatory statutes, see p. 28-29, *infra*) as circumscribing the "subject matter jurisdiction" of federal courts that are asked to review EPA regulations and other final agency actions. See *United States v. Ethyl Corp.*, 761 F.2d 1153, 1154 (5th Cir. 1985).[8] They have emphasized the

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[7] See, *e.g.*, *Enviro Tech International, Inc. v. EPA*, 371 F.3d 370 (7th Cir. 2004) (review of EPA regulations "not within our own authority," because "that task belongs to" the D.C. Circuit); *United States v. Kung-Shou Ho*, 311 F.3d 589, 607-08 (5th Cir. 2002) (challenge to definition of "facility" in 1990 CAA regulations had to be brought in D.C. Circuit); *United States v. Walsh*, 8 F.3d 659, 664 (9th Cir. 1993) (declining to review regulations that were "challengeable under the procedures and limits set out in 42 U.S.C. § 7607(b)(1)"). See also *Siegelman v. EPA*, 911 F.2d 499 (11th Cir. 1990) (claim that "EPA's regulation conflicts with an act of Congress" may not be entertained in enforcement proceeding under RCRA provision, 42 U.S.C. 6976(a)(1), similar to CAA Section 307(b)); *Chemical Weapons Working Group, Inc. v. U.S. Dept. of the Army*, 111 F.3d 1485, 1492 (10th Cir. 1997); *WEPCo.*, 893 F.2d at 914; *Hawaiian Elec. Co., Inc. v. E.P.A.*,, 723 F.2d 1440, 1445 (9th Cir. 1984).

[8] See also, *e.g.*, *Pan American Grain Mfg. Co., Inc. v. EPA*, 95 F.3d 101, 103 (1st Cir. 1996); *Greenpeace, Inc. v. Waste Technologies Industries*, 9 F.3d 1174, 1180 (6th Cir. 1993); *United States v. Walsh*, 8 F.3d 659, 664 (9th Cir. 1993); *Ohio Environmental Council v. United States District Court*, 565 F.2d 393, 397 (6th Cir. 1977).

practical importance of adhering to Section 307(b)'s prescriptions in light of its "clear language and Congress's manifest intent to avoid protracted and inconsistent adjudication." *Id.* at 1156. They have recognized, as has this Court, Section 307(b)'s careful language limiting and channeling judicial review of CAA implementation, means "exactly what it says." *Harrison*, 446 U.S. at 589. See also *Hallstrom v. Tillamook County*, 493 U.S. 20, 31 (1989) (holding that statutory prerequisites to citizen suits under Solid Waste Disposal Act was "mandatory" and leave courts no "discretion" to "disregard these requirements").

This is not the first unauthorized attack on these very 1980 PSD regulations. In *Puerto Rican Cement*, 889 F.2d 292, the First Circuit ruled that the petitioner in a Section 307(a) proceeding for review of a final EPA action of local or regional applicability could not challenge the 1980 PSD "emissions increase" regulations at issue here (as incorporated in the parallel rules governing federally administered PSD areas, see 40 C.F.R. 52.21(b) (1987)). Pointing to the pending but stayed judicial review proceeding in the D.C. Circuit, see n. 3, *supra*, Judge Breyer wrote:

> EPA promulgated the regulations in question in 1980, see 45 Fed. Reg. 52,735 (1980); other parties have challenged their lawfulness in a suit filed in the Court of Appeals for the District of Columbia, see *Chemical Mfrs. Ass'n v. EPA*, No. 79-1112 (D.C.Cir.). The Company has not tried to intervene in that suit (which is still pending). It seems obviously too late for the Company to mount an independent legal challenge here. See *Hawaiian Elec. Co.* [v. *EPA*], 723 F.2d [1440, 1447 (9th Cir.1984)] (holding that a challenge to another provision of 40 C.F.R. § 52.21 was untimely under 42 U.S.C. § 7607(b)(1)).

889 F.2d at 299. See also *WEPCo.*, 893 F.2d at 914 n.6. It should be noted that the prohibitory line the Fourth Circuit leapt across here was far brighter than the one the First Circuit properly declined to cross: This case is an *enforcement action*, governed not only by the 60-day and

D.C. Circuit-only limitations at issue in *Puerto Rican Cement*, but also by Section 307(b)(2)'s specific command that courts "shall not" entertain collateral attacks to EPA regulations and other final actions in enforcement actions. And it comes fully 16 years after the challenge that was "obviously too late" in *Puerto Rican Cement*.

The court of appeals' decision is also in tension with this Court's Section 307(b) decisions. In *Adamo Wrecking*, 434 U.S. 275, a criminal enforcement proceeding against a company alleged to have violated an EPA emissions standard for asbestos, this Court ruled that Section 307(b) did not bar the defendant from interposing the defense that the requirement in question did not constitute an "emissions standard" under the CAA. *Id.* at 285. The Court emphasized the criminal-enforcement context and uncertainty about whether Section 307(b)'s bar was intended to extend to EPA's threshold determination on what is an "emissions standard." Even as it permitted the company to assert this limited defense, the majority emphasized that it was

> aware of the possible dangers that flow from this interpretation; district courts will be importuned, under the guise of making a determination as to whether a regulation is an 'emission standard,' to engage in judicial review in a manner that is precluded by Section 307(b)(2) of the Act. This they may not do.

Id. at 285. In a dissenting opinion joined by two other Justices, Justice Stewart expressed concern that even the limited form of review permitted by the majority's ruling would "frustrate[] the intent of Congress to establish a speedy and unified system of judicial review under the Act," "invite[] precisely the sort of inconsistent judicial determinations by various courts that Congress sought to prevent," and undermine legislative intent "to maintain the integrity of the time sequences provided throughout the Act." *Id.* at 292. He perceived a "camel's nose" in the tent, and "fear[ed] that the rest of the camel" was "almost certain to follow." *Id.* at 293.

The Fourth Circuit's decision here highlights the risks of

circumventing Section 307(b) noted by majority and dissenters alike in *Adamo Wrecking*. See *United States v. Ho*, 311 F.3d 589, 607 (5th Cir. 2002) (*Adamo Wrecking* "specifically forebade" lower courts from considering procedural or substantive inquiries into a regulation during an enforcement proceeding). And here -- where the challenger had every opportunity to present the argument in a D.C. Circuit Section 307(b) petition proceeding -- no due process concerns are present that might arguably warrant a relaxation of the express prohibition on collateral attack set forth in Section 307(b). See *Ethyl Corp.*, 761 F.2d at 1156 ("we would be remiss to allow the narrow holding of *Adamo Wrecking* to bulldoze the statute's jurisdictional limitations in civil enforcement proceedings") (citing *City of Seabrook v. EPA*, 659 F.2d 1349, 1370 (5th Cir. 1981)). Indeed, Section 307(b) protects interests in procedural regularity and fairness – affording EPA, states, regulated entities, and environmental groups alike clear rules on when, where, and how CAA regulations may be challenged – that strongly disfavor the sort of end run allowed here.

The reasons the Fourth Circuit gave for avoiding Section 307(b) only compound its jurisdictional error. In response to objections that EPA's regulations were subject to exclusive review in the D.C. Circuit, the Fourth Circuit contended that it was merely addressing an "interpretation" of EPA's 1980 PSD regulations. See App. 11a n.7. The court reasoned that "the PSD regulations can be interpreted consistently" with the NSPS regulations, citing without any analysis the *district court*'s interpretation of the regulations (which EPA and petitioners contended was patently incorrect),[9] and opined

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[9] The district court misread the provision of the 1980 regulations that provides that an increase in hours of operation or production rate does not constitute a "physical change" under the first prong of the modification test, 40 C.F.R. 51.166(b)(2)(iii)(f) (1987), to mean that even where there is a physical change at a facility, the emissions increases from increased hours of operation enabled by the change are not counted toward increases. App. 59a-62a. But under the plain language of the regulations,

that a "choice of this interpretation – as required under the statute – over the EPA's interpretation is not an invalidation of those regulations." *Id.*

Even if one disregards the panel's own acknowledgement that the "the language and various interpretations of the PSD regulations" were "largely irrelevant to the proper analysis of this case," App. 15a n.7, the Fourth Circuit's asserted reason for bypassing Section 307(b) is demonstrably wrong. Undermining its claim to be engaged in "interpretation" of the regulations, the court made *no* effort to follow the lodestar in any such endeavor -- the regulatory *text*. See *Christensen v. Harris County*, 529 U.S. 576, 587-88 (2000). As other courts of appeals have recognized (in cases *properly* before them under Section 307(b)), the NSPS and PSD regulations *say* very different things, and these plain textual differences have clear consequences. Among other things, the NSPS regulation in question targets "emissions rates" measured in kilograms per hour, 40 C.F.R. 60.14(b) (1987), whereas the PSD regulations address "actual emissions" in "tons per year," 40 C.F.R. 51.166(b)(2), (3), (21) (1987). As the D.C. Circuit explained: "While the NSPS regulatory definition of modification allegedly focuses on the hourly rate of emissions, the NSR definition focuses on net emissions increases measured in tons per year. Compare 40 C.F.R. 60.14 (NSPS with *id* 52.21(b)(2)(ii) (NSR)." *New York*, 413 F.3d at 18. The Seventh Circuit highlighted that same marked difference in *WEPCo*, 893 F.2d at 905. See also, *e.g.*, 57 Fed. Reg. 32,314, 32,316 (July 21, 1992) (contrasting the NSPS and PSD tests for emissions increase).

The court's suggestion that the PSD regulations can be "interpreted" to mean the same thing as the NSPS regulations

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the "increased hours" exclusion extends only to the "physical change" inquiry, not the separate "emissions increase" inquiry. Compare 40 C.F.R. 51.166(b)(2)(iii)(f) with 40 C.F.R. 51.166(b)(3)(i)) (App. 102a, 103a). EPA made this clear when it promulgated the regulations in 1980, 45 Fed. Reg. at 52704, and the district court's misconstruction was explicitly rejected in *WEPCo.*, 893 F.2d at 916 n. 11.

is contrary to analysis in *WEPCo*, 893 F.2d at 905; *Puerto Rican Cement*, 889 F.2d at 296-97; *and* to the D.C. Circuit in the decision authoritatively reviewing the regulations under Section 307(b), *New York*, 413 F.3d at 18. Those courts correctly recognize that the test of emissions increases established under the 1980 PSD regulations is different in textual expression, method of application, and concrete consequences from the hourly "emissions rate" standard under the NSPS regulation highlighted by the district court and the Fourth Circuit. The differences between the maximum hourly emissions rate mandated by the Fourth Circuit and the actual, annual emissions standard expressed in the PSD regulations are large – often (as here) determinative of whether a pollution source will be treated as having increased emissions a great deal, or not at all. See, *e.g.*, *New York*, 413 F.3d at 15 (illustrating consequences of choice between maximum-hourly and actual-annual standards by reference to the facts of *Puerto Rican Cement*, 889 F.2d at 293, 296-98). See also p. 27, *infra*.

Because the 1980 PSD regulations *cannot* be read to provide for the "hourly rate" test ostensibly provided under the NSPS regulations, the Fourth Circuit's rationale for sidestepping Section 307(b) was insupportable. Even had the court actually engaged in close textual exegesis, no amount of "interpretation," however artful, could eliminate the clear differences between the respective regulations (differences that alone seem to violate the panel's conclusion that the CAA requires "the statutory definitions of 'modification' in the PSD and NSPS provisions to be interpreted *identically*." App. 14a (emphasis added).

But even if the court had been correct that it was merely mandating one linguistically possible and statutorily required "interpretation" of the PSD regulations, it still would have lacked authority to strike down EPA's regulatory test for PSD emissions "increases." Contrary to the panel's view, EPA's authoritative "interpretations" of CAA regulations are not somehow exempt from Section 307(b)'s strictures. As this

Court made clear in *Harrison*, 446 U.S. 578, Section 307(b)(1)'s limitations apply not only to regulations, but also to "any other final action" of EPA. Concluding that Section 307(a)'s broad language "must be construed to mean exactly what it says," *id.* at 584, the Court held that a petition for review was the exclusive means of review of an EPA determination that the NSPS applied to respondent's waste-heat boilers.

As the D.C. Circuit explained in *New York*, EPA had repeatedly reaffirmed as the governing standard under the 1980 PSD regulations a test comparing "past annual emissions" to "future annual emissions" – and not the industry petitioners' favored "maximum hourly emissions rate" test. See 413 F.3d at 15 (citing *Puerto Rican Cement Co.*, 889 F.2d 292; *WEPCo.*, 893 F.2d 901; 57 Fed.Reg. 32,314, 32,328 (July 21, 1992), and 67 Fed. Reg. 80,186, 80,199 (Dec. 31, 2002)). If, rather than simply forging ahead with its Plant Modernization Program, Duke had sought an applicability determination from EPA (the course followed by the regulated entities in cases like *Puerto Rican Cement* and *WEPCo.*), it could have filed a petition for review testing EPA's application of its regulations to particular facts (though *not* the legality of the regulations themselves). See *Puerto Rican Cement*, 889 F. 2d at 296-97, 299-300. Had Duke challenged regulations or actions of "national" applicability, its petition had to be filed in the D.C. Circuit.[10] What Duke could not lawfully do, under the statute, is what it was allowed to do here: obtain invalidation of EPA's regulatory definition of PSD emissions "increase" in an enforcement proceeding. See *Adamo Wrecking Cos.*, 434 U.S. at 285; *Puerto Rican Cement*, 889 F.2d at 299-300.

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[10] Suits for review of EPA actions of local or regional applicability may be filed in the regional court of appeals; however, as *Puerto Rican Cement* illustrates, the validity of EPA's national PSD rules would not have been reviewable in such an action. 889 F.2d at 299-300. See also Section 307(b)(1) (exclusive D.C. Circuit review if EPA certifies that "local" decision was "based on a determination of nationwide scope or effect").

This time Justice Stewart's camel has appeared, not as a nose, but as a camel. The Fourth Circuit's ruling cuts a gaping loophole in Section 307(b)'s carefully crafted scheme for judicial review, and it merits this Court's review.

II. THE COURT OF APPEALS' RULING THAT EPA MUST ADOPT IDENTICAL REGULATORY DEFINITIONS OF EMISSIONS "INCREASE" UNDER THE NSPS AND PSD PROGRAMS IS INCORRECT AND CONTRARY TO DECISIONS OF OTHER COURTS OF APPEALS

Having overstepped Section 307(b) limitations on its authority, the Fourth Circuit proceeded to misinterpret the CAA. The court's holding that Congress's use of the same statutory definition of "modification" in the PSD and NSPS provisions "mandated" that EPA interpret an undefined component of that larger definition – emissions "increase" – must be "identically" (App. 14a) for the two programs conflicts with decisions of other courts of appeals, and the "effectively irrebuttable" (App. 17a) interpretive presumption it employed is contrary to this Court's oft-repeated teachings.

Since the earliest days of the PSD program, courts have recognized that terms common to PSD and NSPS – including component terms of the common statutory definition of "modification" – can and should be given different definitions to fulfill those programs' distinct functions and aims. In *Alabama Power*, the D.C. Circuit held that the term emissions "increase" in the CAA's definition of "modification" for PSD – the very term at issue here -- can be interpreted differently for those two programs. 636 F.2d at 401. That court upheld EPA's use of a "bubble" concept ("netting") in measuring emissions increases for PSD, explaining that while *ASARCO Inc. v. Environmental Protection Agency*, 578 F.2d 319 (D.C. Cir. 1978), had held that "a bubble concept would be contrary to the intent of the NSPS provisions," such was "clearly not the case with regard to the PSD provisions." *Alabama Power*, 636 F.2d at 402. As the same court recently explained in *New*

York, EPA's regulations have for decades rested on the understanding that the agency can make reasonable distinctions in its regulations governing NSPS and PSD "modifications" to reflect significant differences between the respective programs work. See 413 F.3d at 11-17, 18. See also *Citizens for Clean Air*, 959 F.2d at 849 ("definitions of the statutory terms are not necessarily transferable between the PSD and NSPS programs"); *WEPCo*, 893 F.2d at 915 ("[u]nlike NSPS, PSD is concerned with changes in *total annual emissions*, expressed in tons per year").

The decision below conflicts with the D.C. Circuit's decision in *New York* in multiple respects. *New York* confirms that, contrary to the Fourth Circuit's theory, the PSD regulation clearly establishes the actual, annual emissions standard the Fourth Circuit believed it could "interpret" away. 413 F.3d at 18. And while the D.C. Circuit found that the "identical regulatory definitions" theory adopted by the Fourth Circuit had been waived, the court's forceful rejection of industry's closely related argument (advanced by Duke in this case) that Congress in 1977 had adopted NSPS regulations embracing an hourly emissions rate test for use in the PSD program, 413 F.3d at 19-20, is wholly incompatible with the Fourth Circuit's analysis here. The D.C. Circuit observed that there were multiple regulatory definitions of "modification" in place in 1977 when Congress added the modification definition for PSD purposes, 413 F.3d at 19, undercutting any notion that Congress intended to impose a unitary, all-purpose regulatory definition covering both programs. And, contrary to the Fourth Circuit, the D.C. Circuit ruled that EPA not only may, but must, tailor its regulatory test for PSD emissions increases to the distinctive statutory requirements of the overall PSD program. See *id.* at 39-40 (PSD provisions, including definition of BACT, *obligate* EPA to apply PSD "to changes that increase actual emissions instead of potential or allowable emissions").

The court of appeals misread *Rowan*, 452 U.S. 247, as "dictat[ing]" the conclusion that Congress "affirmatively

mandated" that the term "modification" "be interpreted identically" by EPA in implementing the PSD and NSPS programs. 411 F.3d at 550. The court reasoned that the "presumption" under *Rowan* was "effectively irrebut[t]able" even by resort to acknowledged "differences between" the "purposes" of the two statutory programs in which the two definitions are found. Pet. App. 17a-18a.

Rowan does not, in fact, support that surprising principle. In *Rowan*, the Court found that the use of nearly identical language in defining the term "wages" in two revenue statutes was "strong evidence" that Congress intended the term to have identical meaning across them, and that Treasury had failed to "implement the congressional mandate in a consistent and reasonable manner." 452 U.S. at 253, 255. It did not treat Congress's use of identical definitions as dispositive, but relied on legislative history evincing a specific congressional intent that the agency define the term "wages" the same way in order to promote "simplicity and ease of administration," a goal ill-served by "[c]ontradictory interpretations of substantially identical definitions." 452 U.S. at 255-57 (quoting S. Rep. No. 77-1631 at 165 (1942)). Here, Congress expressed no intent that terms common to PSD and NSPS be interpreted "identically" and without regard to differences between the programs. To the contrary, Congress, in separate enactments separated by seven years, inserted the definitions of modification into two separate programs that, as courts and EPA alike have repeatedly noted, have distinctly different purposes and mechanics. See pp. 5, 17-18, *supra*.[11]

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[11] In *Rowan* the Court noted that Treasury had abandoned its original interpretation of the term "wages," a "substantially contemporaneous construction of the statute by those presumed to have been aware of congressional intent." may inform a court's construction. 452 U.S. at 253, 258-59. By contrast, in PSD regulations enacted only a year after the 1977 amendments, EPA adopted a definition of modification that differed from the NSPS definition. Compare 40 C.F.R. 52.21(b)(2) (1979) (PSD modification requires increases above a threshold) with 40 C.F.R. 60.14(a) (1979) (NSPS – no threshold). See also *New York*, 413 F.3d at 13-15.

This Court has rejected any "effectively irrebut[t]able" presumption of the sort the Fourth Circuit invoked. It has repeatedly emphasized that terms appearing in different places in a statute – like the term "increases" in the CAA's NSPS and PSD provisions – necessarily gather meaning from the different contexts in which they are used. See *General Dynamics Land Systems v. Cline*, 540 U.S. 581, 595 (2001) ("'the presumption that identical words used in different parts of the same act are intended to have the same meaning * * * is not rigid and readily yields whenever there is variation in the connection in which the words are used to warrant the conclusion that they were employed in different parts of the act with different intent'") (citations omitted); *United States v. Cleveland Indian Baseball Co.*, 532 U.S. 200, 213 (2001) (likening irrebuttable presumption of identical meaning to "original sin") (citation omitted).[12]

The Fourth Circuit failed to heed these instructions, relying instead on an abstract presumption favoring regulatory identity despite "the different purposes of the NSPS and PSD programs," App. 18a, and giving no consideration to how its abstract rule of "identity" would affect the central elements of the PSD enactment (or the NSPS provisions), nor to the reasons why EPA opted to use an "actual annual" emissions test for PSD. Cf. *New York*, 413 F.3d at 22, 23-24 (noting that "[d]ifferent interpretations of

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[12] As the court here observed (App. 4a, 9a), the cross-referenced PSD definition of modification, 42 U.S.C. 7479(C), was added in "technical and conforming" amendments, passed months after the main 1977 CAA amendments, whose sponsor indicated the PSD modification definition was proposed to "to conform" to the "usage in other parts of the Act." Pub. L. No. 95-190, § 14, 91 Stat. 1393, 1399-1404; 123 Cong. Rec. 36,250, 36,252, 36,331 (1977) (statement of Sen. Muskie). As the D.C. Circuit noted in *New York*, Congress's use of a cross-reference to establishing the PSD definition was the equivalent of "having simply repeated" in the PSD context "the definitional language used before in the NSPS context," revealing "no more than if Congress had used a little more ink and repeated the NSPS definitions verbatim." 413 F.3d at 19.

the term 'increases' may have different environmental and economic consequences").

The court of appeals' embrace of an "effectively irrebuttable" presumption obviating all need to look at statutory context and purposes was fundamentally inconsistent with this Court's teachings on the "holistic endeavor," *Koons Buick-Pontiac GMC v. Nigh*, 125 S. Ct. 560, 566-67 (2004) (citations omitted), that is statutory construction. This Court has repeatedly emphasized the need to read statutory words "'in their context and with a view to their place in the overall statutory scheme,'" *Raygor v. Regents of U. of Minnesota*, 534 U.S. 533, 546 (2002) (citations omitted), and in light of statutory purposes, see *Nixon v. Missouri Municipal League*, 541 U.S. 125, 144 (2004) ("in all cases," courts' "task is to interpret the words of [the statute] in light of the purposes Congress sought to serve"); *US Airways, Inc. v. Barnett*, 535 U.S. 391, 397 (2002) (rejecting reading under which statute "could not accomplish its intended objective").

That the statutory test of modification is the same for both NSPS and PSD programs did not answer the "precise question at issue," *Chevron*, 467 U.S. at 842, whether EPA could adopt regulations implementing component terms in that definition – here, the *undefined* and pivotal statutory term, emissions "increase" – differently across the two programs to accommodate real, explicit differences in the programs' legislatively prescribed mechanics and purposes.

Indeed, CAA provisions unique to the PSD program led the D.C. Circuit in *New York* to rule that EPA *must* use an "actual" emissions standard for measuring PSD emissions increases. 413 F.3d at 38-40. The court there rejected, as contrary to the language of the PSD statute (including the definition of BACT), EPA's use in the 2002 PSD regulations of a "potential" emissions standard for measuring "modifications" – the standard that the Fourth Circuit ruled is statutorily *required* for PSD (because it is used in the NSPS regulations). Other CAA provisions that are specific to the

PSD program support EPA's decision to adopt a PSD emissions increase test based on actual, annual emissions – even if EPA chooses to use a maximum-hourly-rate test to identify NSPS emissions increases. The fundamental purpose of the PSD program is to regulate and protect local air quality, 42 U.S.C. 7470 – making it essential that any test of emissions capture real-world changes in emissions. See *Alabama Power*, 636 F.2d at 353 (statute requires "actual emissions" standard); *New York*, 413 F.3d at 39-40 (CAA forecloses emissions-increase test based on "potential or allowable emissions"); 45 Fed. Reg. at 52680 (under 1980 regulations reductions, increases in emissions "will be quantitatively assessed on the basis of an 'actual emissions' baseline, rather than a 'potential to emit' baseline"); *id.* 52699-52700 (discussing "actual, annual emissions" measure for emissions increase). Numerous other provisions of the PSD statute depart from the NSPS provisions in ways that lend specific support to EPA's "actual, annual" test, and undermine any suggestion that Congress intended that EPA's regulations defining the statutorily undefined term, emissions "increase," be identical to regulations under the NSPS program.[13]

The Fourth Circuit's peremptory rule of identity led it to disregard the consequences of the interpretation it adopted. A test for emissions increases that is triggered only by increases in maximum hourly emission rate artificially excludes from

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[13] PSD applies only to "major sources," a class defined by the ability to emit specified pollutants in "tons per year," 42 U.S.C. 7475, 7602(j), and provides a limited exemption for the "expansion or modification" of an existing facility whose emissions will be less than "fifty tons per year." *Id.* 7475(b). Major sources undergoing PSD review must demonstrate that they will not violate an area's "annual" increment, a showing that includes the submission of "one calendar year" of monitoring data. *Id.* 7475(d)(2)(C), (D). Under the Fourth Circuit's approach, conventional reliance on statutory context and structure was out of bounds, because Congress's choice of identical definitions for NSPS and PSD "irrebuttably" prevailed despite any differences between the programs' purposes or mechanics.

the "emissions increase" inquiry one of the three basic factors – hours of operation – that (along with production rate and emissions rate, see *supra*, pp. 7-8) determines how much pollutant a source actually releases into the air. Whether or not such a test fits with the NSPS provisions, it surely undermines Congress's purpose in subjecting "modifications" to PSD review, disregarding as it does real, physical increases in emissions of hundreds of tons and offering "vistas of indefinite immunity," see *WEPCo.*, 893 F.2d at 909, to aging facilities that Congress in 1977 expected would soon be retired. Nothing in the CAA's cross-referenced NSPS/PSD definition of "modification," or in *Rowan*, required such a result.

III. THE CASE PRESENTS RECURRING ISSUES OF NATIONAL IMPORTANCE

The decision below stands as a monument to why Congress chose not to allow for challenges to EPA regulations in enforcement proceedings: The Fourth Circuit set aside as contrary to statute a regulatory test for emissions increases set forth in 25-year-old regulations, and elaborated and applied in *WEPCo* and *Puerto Rican Cement*. It announced a novel and broad rule that the CAA demands uniformity between EPA's NSPS and PSD source modification regulations that conflicts with *Alabama Power* and later decisions confirming EPA's authority to distinguish between NSPS and PSD in defining emissions increases. The court did all this while the regulations in question were before the D.C. Circuit in a Section 307(b) review proceeding in which industry challengers (including Duke) waived the argument adopted by the Fourth Circuit. The court of appeals' decision holding unlawful EPA's use of a PSD "actual, annual" test of PSD emissions increases, and the statutory interpretation underlying it, are starkly inconsistent with the D.C. Circuit's *New York* decision, and the ruling has prompted EPA to initiate a rulemaking despite its continued disagreement with the decision.

Left unreviewed, this extraordinary sequence will surely invite litigants to try to circumvent Congress's carefully wrought and exclusive scheme of CAA review by presenting challenges to EPA regulations in enforcement actions or other district court proceedings.[14] The Fourth Circuit's willingness to issue a broad ruling striking down venerable regulations with only a perfunctory nod toward Section 307(b) will surely invite and support future efforts at thinly veiled, piecemeal collateral attacks on national CAA rules – just the result eight members of the Court feared in *Adamo Wrecking*. And the panel's casual and legally inaccurate explanation that Section 307(b) somehow does not bar challenges to the "interpretation" of regulations – a theory the panel elsewhere appeared to disavow, App. 11a n.3 – provides a large-print roadmap for such evasions.

The decision is all the more troubling because the judicial review provisions of many other major environmental and public health statutes are nearly identical to CAA Section 307(a), among them the Clean Water Act, 33 U.S.C. 1369(b); the Oil Pollution Act, 33 U.S.C. 2717(a); the Safe Drinking Water Act , 42 U.S.C. 300j-7; the Noise Control Act, 42 U.S.C. 4915(a); the Resource Conservation and Recovery Act, 42 U.S.C. 6976(a); and CERCLA, 42 U.S.C. 9613(a). The Fourth Circuit's disregard for the bar on collateral attack on EPA regulations will harm the various interests – from EPA, to state air administrators, to environmental groups, to business competitors – who should be able to rely on adherence by litigants and courts to the exclusive mechanisms provided for in CAA Section 307(b). This is particularly so given the enormous time and expense that are invested in jurisdictionally appropriate, multi-party review proceedings in the D.C. Circuit that the Section 307(b) scheme fosters.

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[14] By allowing Duke to prevail on an argument it had *waived* in the tribunal exclusively empowered by Congress to hear challenges to EPA regulations, the ruling will tempt parties selectively to withhold from the D.C. Circuit challenges they deem more viable in other fora.

The court of appeals' reading of the CAA's definition of "modification" unsettles decades of judicial precedent and administrative policy and practice built around the recognition that EPA may make reasonable distinctions in its implementation of the component terms of the statutory "modification" definition. The court of appeals' broad and categorical requirement of identity between the NSPS and PSD regulations will be invoked as a basis to restrict EPA's flexibility to administer the PSD and NSPS programs in the future.[15] And the court's misreading of *Rowan* to create an "effectively irrebuttable" presumption so powerful as to foreclose inquiry into statutory context or purpose, or empirical consequences, threatens mischief even beyond the important questions of environmental law presented here.

The profound implausibility of the Fourth Circuit's reading of the statute, and the likelihood that it will foster further litigation, are apparent in EPA's recent notice of proposed rulemaking. There, EPA acknowledged that even its proposed regulations will be inconsistent with the regulatory "identity" requirement the Fourth Circuit found in the CAA's plain language, but insisted that "[t]here are differences between the two programs that prevent a wholesale adoption of the NSPS modification definition into the major NSR provisions." 70 Fed. Reg. at 61090.[16]

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[15] The validity of the "actual, annual" test will retain considerable importance regardless of whether EPA proceeds with its proposal to amend its regulations in response to the decision – since any new regulations would be prospective and would not apply to numerous major enforcement proceedings that are pending. *U.S v. AEP*, Consol. Nos. C2-99-1182 and C2-99-1250 (S.D. Ohio filed June 28, 2005); *U.S. v. Cinergy*, No. 99-C-1693 (S.D. Ind. filed Nov. 3, 1999); *U.S. v. Alabama Power*, No. 01-152-VEH (N.D. Ala. filed Jan. 12, 2002); *U.S. v. East Kentucky Power Coop.*, No. CV-04-34 (E.D. Ky. filed January, 2004).

[16] EPA cited various ways in which the NSR/PSD and NSPS programs differ, and added (70 Fed. Reg. at 61090 n.30): "We disagree with the Fourth Circuit's holding in *Duke Energy*, and thus believe we are able to make reasonable distinctions between the NSPS and NSR programs where appropriate."

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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